

# **Employer Appeals: Procedures Under Section 68**

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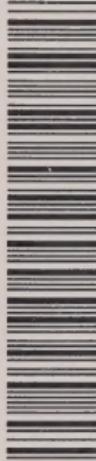
## **EMPLOYMENT**

## **STANDARDS**

## **ACT**

R.S.O. 1990,

C.E-14 as Amended



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Office of Adjudication

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**Ontario**

# **What is the Office of Adjudication?**

The Office of Adjudication administers the final level of appeal to which employers or employees may bring their disputes with decisions or orders of employment standards officers. Such appeals are heard by adjudicators (for reviews started by employees, under s. 67 of the Act) or referees (for reviews started by employers under s. 68 of the Act; or for references by the Director of Employment Practices under s. 69 of the Act). Adjudicators and referees are independent decision-makers who hold hearings to review evidence about a particular dispute, then issue a decision which resolves the dispute by binding the parties to that decision.

## **What Does the Office of Adjudication Do?**

The Office of Adjudication processes and arranges for the hearing of employer or employee appeals from decisions of employment standards officers (orders to pay, refusals to issue orders, disputed orders). The Office also processes and arranges for the hearing of references from the Director of Employment Practices. Finally, the Office is responsible for the processing and arrangement of appeals from decisions of occupational health and safety inspectors (see brochure entitled: **APPEALING ORDERS ISSUED UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT**).

# **Employer Appeals: Procedures under s. 68 of the Employment Standards Act**

Section 68 of the *Employment Standards Act* permits employers or former employers who are dissatisfied with a decision ("order to pay") of an employment standards officer to apply for a review of that decision by a referee.

S. 68 appeals can only be launched by an employer when it pays the money found owing in an order to pay to the Director of Employment Practices in Trust. Directors against whom orders have been made also have the right to appeal, but need not pay the money into trust. The referee holds a hearing at which all those who could be affected by his or her decision have a right to appear, present relevant evidence, and explain why they think the employment standards officer was wrong or right in the decision he or she made.

Referees can uphold the officer's order to pay and have the monies in trust paid out to employees; they can change the amount; or they can order part or all of the monies in trust to be returned to the employer. Decisions of the referee are final and binding on the parties to the hearing.

The purpose of this document is to acquaint persons who will participate in hearings before a referee with the basic procedures which apply to these applications. **This document is prepared as a guide only, and is not meant to advise persons of their rights in law. For accurate reference, you should refer directly to the *Employment Standards Act*, or consult a lawyer.**

# Before the Hearing

All those who might be affected by the decision of a referee in a section 68 application will receive a Notice of Hearing telling them when and where the hearing is to be held. The notice is sent to the employer or employers making the application for review (or their lawyer or other person acting on their behalf); the employee(s) involved; and the Ministry of Labour's legal counsel. Notices are normally sent out by courier.

In addition to the Notice of Hearing, the person making the application for review will receive a letter from the Registrar acknowledging the application, a copy of which will also be sent to the employee(s) and the Ministry of Labour lawyer. Also enclosed will be any material the Office has received concerning the application.

# Adjournments

Even though it takes place in a meeting room instead of a courtroom, the hearing is a legal proceeding. If you have information of evidence to present to the referee you must attend the hearing when it is scheduled. If you don't, the hearing will go ahead anyway.

Sometimes, however, it is impossible for one of the parties to come to the hearing on the date it is scheduled. Adjournments may be granted **in special circumstances**. The Registrar of the Office of Adjudication will normally expect a person seeking an adjournment to contact the other parties and see if they consent to the adjournment. If they do not, the adjournment request must be made in writing to the Registrar, and it will be ruled upon by a referee after the other parties have been given a chance to write a letter saying why they think the adjournment should not be granted.

If you need an adjournment, you must act immediately upon receiving the Notice of Hearing. Otherwise, there will simply not be enough time to process the adjournment request before the hearing, and it will go ahead as scheduled. If you have a reason for seeking the adjournment which comes up at the last minute, you or your agent can come to the hearing and ask the referee to grant an adjournment. **YOU SHOULD NOT EXPECT A HEARING TO BE ADJOURNED UNLESS THERE IS A VERY GOOD REASON.** If you or one of your important witnesses is too ill to attend the hearing, that is a good reason. If the date is simply inconvenient, that is not. If the problem is the availability of a lawyer, the party seeking an adjournment should be prepared to explain why another lawyer from the firm, or in the case of the Ministry of Labour, from their Legal Services Branch, cannot handle the hearing.

# **Subpoenas**

If there is someone you require to attend at the hearing to provide evidence or information to the referee, but you feel this person will not come to the hearing unless he or she is ordered to do so, you can get a subpoena from the Office of Adjudication ordering their attendance and ordering them to bring with them whatever documents you describe in the subpoena. A subpoena must be delivered **in person** and must be accompanied by the required **payment for attendance**.

# **Interpreter Services**

A party requiring an interpreter for the hearing should contact the Office of Adjudication as soon as possible.

# **At the Hearing**

At the hearing, all parties are expected to attend and to be prepared to present the referee with all the evidence and information which they believe will help the referee understand their position. As the Notice of Hearing makes clear, if a party who is given notice does not attend at the hearing, the hearing may and most times will go ahead without them. If the employer making the application does not attend the hearing, the referee normally will dismiss the application for review as having been abandoned. The employee(s) involved need not appear at a s. 68 hearing. Thus if you, as employer, have applied for review of an officer's decision, you must attend at the hearing or you run the risk of the referee making a decision which goes against you.

## **Representation**

Employers and employees are entitled to be represented by a lawyer at the hearing, but they don't have to be. They might choose to represent themselves, or to be represented by a person who is not a lawyer but is acting as their agent. The Ministry of Labour is always given notice of the hearing (since it is a decision of the Ministry's employment standards officer which is being reviewed), and is usually represented by a lawyer or a paralegal.

# The Hearing

The hearing will convene at the time and place stated in the Notice. The referee will introduce herself or himself, and explain the basic procedure to all those present.

If you are the applicant, you will be asked to make a brief opening statement explaining what you are seeking and why you think the officer was wrong. The Ministry of Labour and the employee(s) will also be given a chance to make an opening statement explaining what their position is.

Unless everybody agrees about what the facts are, evidence will have to be presented. This usually will involve the applicant and any witnesses giving a statement, or testifying. Before doing so they will be asked to promise or affirm that all the evidence they give will be true. Any documents which might assist the referee should be presented at this time — examples might include pay stubs, records of employment (separation slips), letters of termination, and anything else you think might be helpful to the referee. Four copies of all documents you wish to use as evidence should be brought to the hearing for the referee and the other parties. The Ministry will then call its evidence, if any, followed by the employee(s). All parties will have a chance to ask questions of the witnesses called by the other parties (cross-examine them).

After all the parties have presented their evidence, everyone is given an opportunity to make final argument, or a closing statement. This is an opportunity to review the evidence and tell the referee what he or she should decide as a result. Usually, the referee will end the hearing and the parties will receive a written decision by mail in due course. Sometimes, the referee will decide the matter orally at the end of the hearing, and issue a decision in writing at a later time confirming that decision.

## **Role of the Referee**

The referee must decide the case based only on information obtained at the hearing. You cannot provide additional information to the referee afterwards, unless you have been requested to do so. You also may not communicate privately with the referee about the case before, during or after the hearing. Even though the hearing might not seem very formal, the referee is acting in the role of judge, and you cannot try to influence the referee's decision except during the hearing with all the other parties present.

# The Decision

The decision of the referee is final and binding. That means that if the referee affirms the order to pay or amends it, the monies held in trust with the Director of Employment Practices will be distributed accordingly; if the referee decides that more money is owing, a new order may be issued. If the referee determines that no order to pay should have been issued, the money held in trust will be returned to the employer.

There is no appeal from the decision of a referee except by a process called judicial review which takes place before the Ontario Court of Justice (General Division), Divisional Court.

The Office of Adjudication is not responsible for enforcing the referee's decision. The Employment Practices Branch of the Ministry of Labour has a Collection and Trust Fund Section which distributes funds paid into trust when s. 68 appeals are determined. If a referee has ruled that you are entitled to receive money from your employer or former employer, you should contact the Ministry of Labour, Employment Practices Branch, for collection purposes.

# **Pre-Hearing Settlement**

Disputes may be resolved by agreement of all the parties to the hearing. The Ministry of Labour employs individuals called "mediator/advisors" who sometimes contact the parties and assist them in attempting to come to an agreement. The Office of Adjudication is not involved in the settlement process. The "mediator/advisors" have no connection with the Office of Adjudication.

The Office encourages all parties to consider whether a matter can be satisfactorily resolved prior to the hearing.

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